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before the

SUBCOMMITTEE ON THE FEDERAL WORKFORCE
AND AGENCY ORGANIZATION
COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

on

ADMINISTRATIVE LAW JUDGE PAY AND RETIREMENT

MAY 16, 2006

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to discuss human resources management of Federal administrative law judges (ALJs) and to respond to calls for changes in their pay and retirement benefits. For the past 60 years, ALJs have provided a vital service in the administration of Federal programs. We are committed to ensuring they can continue to recruit and retain a high caliber of personnel while respecting their independence of operation.

Background

The position of ALJ, originally called hearing examiner, was created by the Administrative Procedure Act (APA) of 1946, Public Law 79-404. The APA ensures fairness and due process in Federal agency rulemaking and adjudication proceedings and provides

aggrieved parties an opportunity for a formal hearing on the record before an impartial hearing officer. It also provides for a merit system of selection administered by the Office of Personnel Management (OPM) and statutory protection of the ALJ's decisional independence from undue agency influence.

As of last December, the Federal Government was served by 1,428 ALJs in 26 Departments and agencies. Of these, the vast majority (1,176, or 82 percent) were employed by the Social Security Administration. Other organizations with a significant number of ALJs include the DHHS Office of Medicare Hearing and Appeals (53), the National Labor Relations Board (50), and the Department of Labor (40).

On average, ALJs are age 61.2 with 21.0 years of service, both higher than the Government-wide averages for all employees of age 46.4 with 15.2 years of service. ALJs remain in their positions longer than most Federal employees. Over the last 4 years (FYs 2002-2005), ALJs retired on average at age 69.6 with 31.7 years of service, compared with age 58.7 with 27.7 years of service for employees generally. ALJs may be removed only for cause and almost never resign from their positions; a total of only 12 have done so over the last 4 years.

RECRUITING IMPROVEMENTS ARE UNDER WAY

The Office of Personnel Management is actively engaged in improving the system of human resources management for ALJs. We are doing this by developing regulations to update their personnel system, modifying the ALJ entrance examination to make it more reflective of actual work experience, and establishing an independent ALJ qualifications standard, as is the case for other occupations, rather than incorporating the standards only as a part of the vacancy

announcement.

In order to assure the requirement for a merit selection system is met, OPM (and its predecessor agency, the Civil Service Commission) has administered an ALJ examination and maintained a list (or register) of qualified ALJ candidates. To maintain the relevance and validity of the examinations, OPM has periodically conducted studies to revise and update elements of the exam. In 1999, the exam and register were suspended pending the outcome of litigation in *Azdell/Fishman*. In that case, non-preference eligibles challenged the 1996 scoring formula used in the examination because, they alleged, that the revised formula gave too much weight to veterans' preference. The Merit Systems Protection Board ruled that the scoring system was an unlawful employment practice and imposed various stays. OPM challenged the Board's ruling before the Federal Circuit, which ruled in OPM's favor and vacated the Board's orders. After the Federal Circuit mandate issued in July 2003, OPM reactivated the suspended register. Still, OPM opted to close the exam (except for 10-point veterans), because (1) work was already underway to develop a new exam, and (2) the present register contained sufficient numbers of high-quality candidates to meet projected agency needs.

We have been able to respond to agency requirements for qualified ALJ candidates, and will be able to continue to do so. Currently, the existing register contains 1,197 qualified candidates for ALJ positions. Although the register has been closed to all but 10-point veterans since 1999, we have verified that those candidates are still actively interested in an ALJ position, and have invited them to provide updated information. From January 1, 2005, through the 8th of this month, over 140 selections were made from certificates issued from the register. This is 10

percent of the ALJ workforce, and clearly demonstrates our continuing ability to fill ALJ positions.

OPM is presently completing work on the new ALJ exam. Although the opening date will depend entirely upon the issuance of newly proposed ALJ regulations, OPM is committed to rolling out the new exam expeditiously once the revised regulations become effective. When a new register is generated from the new exam, the current register will be terminated. When the new exam comes out, OPM also plans to take advantage of our state-of-the-art examining technology, USA Staffing, which allows applicants to apply on-line.

We are making great progress in developing the revised regulations referenced above. In December 2005, OPM posted a proposed rule to revise the ALJ program. The proposed rule removed redundant procedures and outdated information, clarified bar membership requirements, and provided for the ALJ examination process to be established in a manner similar to other OPM examinations. The proposed rule was open for public comment for 60 days. In conjunction with publishing these proposed regulations, OPM also posted a new ALJ qualification standard on its Web site. The ALJ qualification standard was also open for public comment for a 60-day period. At this time, OPM is carefully considering the comments submitted on both the proposed rule and ALJ qualification standard

PAY

Let me begin a discussion of pay issues affecting ALJs today by briefly reviewing the history of pay for these officials. From the start, the APA excluded ALJs from performance or

“efficiency” ratings in order to protect their independence. This exclusion is now codified in chapter 43 of title 5, U.S. Code, at section 4301(2)(D). Until 1991, ALJs were classified and paid as General Schedule employees. As required by the Federal Employees Pay Comparability Act of 1990, a new pay system was established for ALJs in 1991. At that time, most ALJs were classified and paid at grade GS-15 of the General Schedule, though some ALJs—especially those in higher level managerial positions—were classified at grades GS-16, 17, and 18.

As in the case for members of the Senior Executive Service (SES), members of Boards of Contract Appeals, and employees in other senior-level positions, the maximum rate of pay for ALJs is linked to the Executive Schedule. The law caps total pay (including locality pay) for ALJs at the rate for Executive Level III—currently \$152,000. While it is true that about 43 percent of all ALJs currently are paid at the capped rate, we have seen no evidence that this phenomenon has resulted in significant recruitment or retention problems.

Groups representing ALJs have taken note of the fact that the pay cap for SES members was increased from level III to level II of the Executive Schedule under legislation enacted by Congress in late 2003. In 2006, the rate for level II is \$165,200. However, the 2003 legislation did not authorize automatic pay increases for SES members. Indeed, the higher SES pay cap applies only to SES members covered by performance appraisal systems that are certified by OPM, with the concurrence of the Office of Management and Budget, as making meaningful distinctions based on relative performance. And SES members also lost their entitlement to locality payments under the 2003 legislation.

The question as to whether ALJ pay levels should be adjusted upward to match the pay levels of SES members who now have access to higher rates involves two separate

determinations. First, we must evaluate the level of duties and responsibilities assigned to ALJs to determine whether they are comparable to those of SES members or employees in other similar positions. At this time, it is not clear whether that is the case. However, a comparison of pay levels for judges across Federal, State, and local governments may be instructive.

The Bureau of Labor Statistics' Occupational Outlook Handbook, 2006-07 Edition, reflects judicial pay as of 2004, when ALJs had a top salary of \$145,600. The Handbook indicates that judges, magistrate judges, and magistrates had median annual earnings of \$93,070 in May of 2004. The middle 50 percent earned between \$54,140 and \$124,400. The top 10 percent earned more than \$141,750, while the bottom 10 percent earned less than \$29,920. Median annual earnings of judges, magistrate judges, and magistrates were \$111,810 in State government and \$65,800 in local government. Administrative law judges, adjudicators, and hearing officers earned a median of \$68,930.

The Handbook also includes the results of a 2004 survey by the National Center for State Courts showing that salaries of chief justices of State high courts averaged \$130,461 and ranged from \$95,000 to \$191,483, salaries of State intermediate appellate court judges averaged \$122,682 and ranged from \$94,212 to \$164,604, while salaries of State judges of general jurisdiction trial courts averaged \$113,504 and ranged from \$88,164 to \$158,100.

In the Federal court system currently, the Chief Justice of the U.S. Supreme Court earns \$212,100, and the Associate Justices earn \$203,000. Federal court of appeals judges earn \$175,100 a year, while district court judges have salaries of \$165,200 (equal to the rate for Executive Level II), as do judges in the Court of Federal Claims. Federal judges with limited

jurisdiction, such as magistrates and bankruptcy court judges, have salaries of \$151,984, which is slightly less than the top rate for ALJs (\$152,000).

Second, this Administration believes that higher pay levels, if otherwise justified, must be accompanied by the development of robust performance management systems. OPM believes that care must be taken to ensure that we maintain the integrity and independence of the administrative judiciary. However, we also believe that this can be accomplished at the same time as the goal of ensuring that differences in pay levels are driven by performance factors.

One performance management option that bears consideration is a system of peer review within the ALJ community that maintains strict separation from influence by officials of the employing agency whose policies and decisions are subject to adjudication. Such a system could be designed to make meaningful distinctions in performance and pay based on such factors as case management or the thoroughness of any legal research conducted in connection with reaching a decision—without regard to the substance or outcome of the decision. We have previously offered to work with the ALJ community to develop robust performance appraisal systems that are consistent with preserving the integrity and independence of the administrative judiciary.

We already have substantial experience with performance appraisals in organizations that have responsibility for independent review of agency actions. Furthermore, we have been able to create structures for such review without harm to the independence of the organizations employing the individuals being evaluated. In particular, these actions have been accomplished in a number of Offices of Inspectors General (IGs). As with IGs, we are not suggesting that the

review be accomplished by parts of the organization whose work is being reviewed, or by other outside entities. Instead, these reviews are being accomplished within the IG offices internally.

Most ALJs are employed in organizations of significant size, in which an internal review of work can be performed without outside interference. We do understand that such processes may not be universally applicable and that different situations may require different methodologies. However, we believe that robust performance appraisal systems are essential and more than worth the effort to get right.

ADMINISTRATION

Your invitation also asks us to address OPM's management of the ALJ program. Groups representing ALJs have suggested that we establish a special office within OPM to deal with ALJ issues. Director Linda M. Springer is personally committed to seeing that all ALJ issues are appropriately addressed. However, other groups are making the same request for dedicated personnel to address their issues, and the Director needs to be able to appropriately balance those interests across multiple areas as we work to fulfill our mission statement. The Director will respond to all demonstrated needs, but it is important for her to have the flexibility to determine how best to do that. OPM's General Counsel has been serving as the initial contact for ALJ issues with support from a working group of staff drawn from the various offices within OPM with responsibility for issues affecting ALJs. If at any time the Director determines that this arrangement is not effective, she will make other arrangements

RETIREMENT

As indicated earlier, on average, ALJs are older with more service than most Federal employees at retirement. In our view, their retirement benefits are appropriately proportionate with their careers.

In preparation for today's hearing, your staff asked us to review H.R. 1864, the "Administrative Law Judges Retirement Act of 2005" introduced last year by Representative Albert Wynn of Maryland. Taking into account both eligibility and computation, we believe H.R. 1864 would give ALJs a more liberal retirement benefit structure than available to any other retirement-covered group, including law enforcement officers, firefighters, and Members of Congress. The ongoing costs of providing this enhanced benefit would be costly, and providing these benefits to current ALJ's would create a substantial unfunded liability. Further, in its present form, it contains significant technical drafting issues.

If H.R. 1864 was enacted, then, under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS), ALJs would be able to voluntarily retire with an unreduced annuity at age 55 with 10 years of service, and with a reduced annuity at any age with 10 years of service. If there was a Voluntary Early Retirement Authority, or an ALJ was involuntarily separated, he or she could retire at any age with only 5 years of service. In the annuity calculation, a retiring ALJ would receive 2.5 percent credit per year under CSRS, and 1.7 percent credit per year under FERS, for all ALJ service, plus up to 5 years of military service, while law enforcement officers and firefighters are limited to 20 years of civilian service at those rates.

To create such a generous structure for this group would greatly complicate the situation *vis-a-vis* other groups who have or want special retirement benefits. Other special retirement programs applicable in the executive branch, such as for law enforcement officers and firefighters, are based upon the human capital management issues resulting from the physical demands of the specific position and prematurely terminated careers requiring mandatory retirement at a relatively early age. On the other hand, ALJs are permitted to continue to work without age limit, with approximately a quarter of active ALJs being at least 65.

The only explanation we have heard in support of these liberalizations is that ALJs come to their Federal careers later than other employees. It would appear (from average age and years of service statistics) that ALJs do enter Government service at about age 40, compared with age 31 for Federal employees generally. However, to the extent that ALJs do not earn a full retirement benefit, it is because they have entered Federal service after a professional legal career in the private sector or state or local government during which they had the opportunity to make provision for their retirement. We see no recruitment or retention reasons to enhance the pension formula to effectively compensate ALJs for deferring entry into Federal jobs. Thus, we believe that the existing retirement provisions applicable to ALJs are appropriate, and that no need has been demonstrated for modifications at this time.

CONCLUSION

We have made much progress on the issues relating to competitive recruitment and believe matters are close to being finalized. There is no retention problem. In the area of pay,

while further evaluation of the level of duties and responsibilities assigned to ALJs is necessary, any access to higher pay levels must be accompanied by the development of robust performance management systems. In our view, no justification for changing the current, competitive retirement structure for ALJs has been demonstrated.

In short, the overwhelming objective evidence is that we currently have no difficulty in either recruiting or retaining a capable ALJ workforce.

This concludes my statement. I will be glad to answer any questions you may have.